87 1027

Supreme Court, U.S.
FILED
SEP 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK RONALD RESTER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

On Appeal From The Texas Court of Appeals
Fourteenth Supreme Judicial District
At Houston, Texas

JURISDICTIONAL STATEMENT

PAUL D. FUNDERBURK
1401 Rosalie, Suite 2
Houston, Texas 77004
(713) 524-6144

Attorney for Appellant

QUESTIONS PRESENTED

QUESTION ONE

Whether or not the marijuana prohibition law of Texas is violative of the United States Constitution, Amendments, I, IV, V, VI, VIII, IX, X, and XIV and, as subsidiary question fairly raised under Rule 15.1(a) Supreme Court Rules, whether the marijuana prohibition laws of all other states are violative of such Amendments and whether Amendment X of the United States Constitution is violated by the operative effect of a United States Treaty, the "Single Convention on Narcotics, 1961", and a United States Statute, the "Comprehensive Drug Abuse Prevention and Control Act of 1970."

QUESTION TWO

Whether or not under Amendment V of the United States Constitution, there was double jeopardy in this case, autrefois acquit, which was first filed as a misdemeanor case in Harris County, Criminal Court at Law No. 6 where Appellant pleaded guilty

but the judge refused to accept the proferred plea because he was successfully convinced by the State prosecutor that the case should be later brought by indictment as a felony proceeding for possession of a larger amount of mari-juana, the envisioned felony proceeding being the origin of this case on appeal.

QUESTION THREE

Whether or not the holding of this Court in Evitts vs. Lucey, 469 U.S. 387 (1985) was violated by the Opinion of the Court of Appeals (thereby denying Appellant the Sixth Amendment right to effective assistance of counsel on his "first appeal as of right" in state court) in the refusal of the Court of Appeals to grant Appellant's two motions to remand the case for further investigation based upon the contents of an affidavit executed by Appellant's attorney, the undersigned (said Affidavit being contained in the duly certified appellate record of

the case), which stated that the said attorney had rendered ineffective assistance of counsel of Appellant in advising him to misrepresent the voluntariness of the plea to the trial judge when entering the guilty plea.

QUESTION FOUR

Whether or not under Amendments V and XIV of the United States Constitution, due process of law, the presumption of innocence was violated because of the improper content, handling, and argument from a presentence investigation in the trial court when the report stated that Appellant was guilty of an uncharged offense (i.e., distribution of marijuana) and said report was used by the trial judge at a time before the finding of guilt on the offense actually charged in the indictment (i.e., possession of marijuana only).

QUESTION FIVE

Whether or not Amendments V and XIV of the United States Constitution are violated by a State presumption of jurisdiction in a felony court based only on Appellant's judicial confession as to the weight of the marijuana allegedly possessed and with no other evidence on the matter of record to sustain the statutory jurisdiction of the felony court, and when the indictment does not state whether the possession was, or ever had been, actual or constructive possession.

II

LIST OF PARTIES

The only parties to this appeal are the appellant, Frank Ronald Rester, and the State of Texas. However, the implications of the question upon which this appeal is based greatly expand the number of parties directly interested in the outcome of such an appeal. Such implications, fairly included as subsidiary questions herein, directly affect the

Solicitor General of the United States and the Attorney General of each of the States of the United States. At present, such persons are not parties to this appeal but might be brought into such appeal at the discretion of the United States Supreme Court as was done in Brown vs. Board of Education of Topeka, 347 U.S. 483, at 496, (1954).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....1

LIST OF PARTIES.....4

TABLE OF CONTENTS.....6

TABLE OF AUTHORITIES.....8

OPINION BELOW.....15

STATEMENT OF JURISDICTION.....15

CONSTITUTIONAL, STATUTORY AND TREATY

PROVISIONS INVOLVED.....18

STATEMENT OF THE CASE.....19

THE SUBSTANTIALITY OF FEDERAL QUESTIONS.....39

CONCLUSION.....67

CERTIFICATE OF SERVICE.....69

APPENDIX A: Opinion of the Texas Court of

Appeals, 14th Judicial District at Houston.....71

APPENDIX B: Judgment of the 262nd District

Court.....85

APPENDIX C: (1) Order Overruling Motion for Rehearing in the Texas Court of Appeals, 14th Supreme Judicial District at Houston (2) Order Overruling Motion for Rehearing in Texas Court of Criminal Appeals.....93

APPENDIX D: Notice of Appeal.....96

APPENDIX E: Constitutional, Statutory and Treaty Provisions.....101

U. S. Constitutional Amendments.....101

Single Convention on Narcotic Drugs (1961) ("Treaty").....107

U. S. Statute "Comprehensive Drug Abuse Prevention and Control Act of 1970" 21 U.S.C. 801 et seq. 112

Texas Revised Civil Statutes, Art. 4475-15, Section 4.051.....115

APPENDIX F: Harris County Criminal Court of Law No. 6 Reset Sheets.....118

APPENDIX G: 262nd District Court at Harris County Reset Sheets.....124

APPENDIX J: Excerpt from Motion to Abate Appeal..127

APPENDIX K: Excerpt from Supplemental Motion to Abate Appeal.....131

APPENDIX L: Motion to Withdraw Judgment From the Record.....136

APPENDIX N: Excerpt from Motion for Rehearing in (1) Texas Court of Appeals, 14th Supreme Judicial District and (2) Texas Criminal Appeals related to marijuana prohibition.....145

TABLE OF AUTHORITIES

CASE Page

Abie State Bank v. Bryan, 282 U.S. 765, 51 S.Ct. 252, 75 L. Ed. 690, (1931) 43

Baker v. Carr, 369 U.S. 185, 82 S.Ct. 691, (1964) 46,48

Brown v. Board of Ed., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, (1954) 5

Brown v. State, 367 So. 2nd. 616, (Fla., 1979) 55

Chastleton Corp. v. Sinclair, 264 U.S. 543 at 547, 44 S.Ct. 405, 68 L.Ed. 841, (1924) 43

Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed. 2d 24, (1978) 53

English v. Miller, 341 F.Supp 714 (E.D. Va., 1972) Reversed Sub.Nom.as English v. Va. Prob. & Par. Bd., 481 F.2d 188, (4th Cir., 1973) 44,45,49

Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed. 2d 821, (1985) 2,34,60

Ex Parte Myers, 618 S.W. 2d 365, 368, (Tex. Crim. App., 1981) 53

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed. 2d 299, (1983) 23

Garrett v. U.S., 471 U.S. 733 at 775, 105 S.Ct. 2407, 85 L.Ed. 2d 764 (1985) 35

Green v. U.S., 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed. 2d 199, (1957) 53

Griswold v. Conn., 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510, (1969) 45

Keith v. State, 232 S.W. 321 at 325, 89 Tex. Crim. 264, (1921) 30,56

Kercheval v. U.S., 274 U.S. 220 at 223, 47 S.Ct. 582, 71 L.Ed. 1009, (1927) 54,55

Leary v. U.S., 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed. 2d 57, (1969) 42

Lynk v. LaPorte, Sup. Ct. No. 21, 789 F.2d 554, (7th Cir., 1986) 17

Markiewicz v. Black, 330 P.2d 539, (Colo., 1958) 55

Ochoa v. Estelle, Jr., 445 F.Supp. 1076 at 1081, (N.D. Ohio, 1977) 53

People v. Lorentzen, 194 N.W. 2d 827, 387 Mich. 167 at 194, (1972) 54

People v. McCabe, 275 N.E. 2d 407, 49 Ill. 2d 338 (Ill., 1971) 44

People v. Sinclair, 194 N.W. 2d 878, 387 Mich. 91, (1972) 44,49

People v. Summit, 517 P.2d 850, (Colo., 1974) 49

People v. Williams, 124 Cal. Rptr. 253, 51 Cal. App. 3rd 346, (1975) 23

Ravin v. State, 537 P.2d 494, (Alaska, 1975) 39,45

Sam v. State, 500 P.2d 291, (Okla. Crim. App., 1972) 49

Santobello v. N.Y., 404 U.S. 257 at 266, 92 S.Ct. 495, 30 L.Ed. 2d 427, (1981) 28,32

Smith v. Digmon, 434 U.S. 332, 98 S.Ct. 597, 54 L.Ed. 2d 582, (1978) 17

Stanley v. Ga., 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542, (1969) 45

State v. Blackwell, 198 P.2d 280, 200 P. 2d 280, 65 Nev. 405, (1948) 55

State v. Kantner, 493 P.2d 306,53 Haw. 327,(1972) 45

State v. Zornes,469 P.2d 552,78 Wash. 2d 9,(1970)-49

U.S. v. Corrick 298 U.S. 435 at 440, 56 S.Ct. 829,

80 L.Ed. 1263, (1936)_____65

U.S. v. Kiffer, 447 F. 2d 349, (2nd. Cir., 1973)__45

U.S. V. Wade, 388 U.S. 218 at 226-227, 87 S. Ct.

1926 at 1930-1, 18 L.Ed. 1149, (1967)_____63

CONSTITUTION AND TREATY

U. S. CONST. AMEND.I _____1,18,45,46

" IV _____1,18,23

" V _____1,3,4,18,23,37,62,64,66

" VI _____1,18,52,62,63

" VIII _____1,18

" IX _____1,18,40

" X _____1,18

" XIV _____1,3,4,18,23,62,66

18 U.S.T. 1408,T.I.A.S. 6298_____1,18,41,49,50,51

STATUTES AND RULES

Tex. Rev. Civ. Stat. Ann., Art. 4476-15, Sec. 4,051,
(Vernon 1986) 1,15,18,21,30,36,37,50,67

21 U.S.C. 802 eq Seq. 18,49,50,51

28 U.S.C. 2103 68

28 U.S.C. 1257 17,50

Tex. Crim. Proc. Code Ann. Sec. 40.01,
(Vernon 1987) 30

Tex. Crim. Proc. Code Ann., Art. 27.05
(Vernon 1983) 23

U. S. Supreme Court Rules, Rule 15.1(a) 51

MISCELLANEOUS

NAT'L RESEARCH COUNCIL, An Analysis of Marijuana
Policy, (1982) 39,42,44,50

NAT'L RESEARCH COUNCIL, Marijuana and Health,
(1982) 44

NAT'L COMM. ON MARIJUANA AND DRUG ABUSE, Marijuana a Signal of Misunderstanding, (1972) 44

SOLER, M., Of Cannibus and the Courts, A Critical Examination of Constitutional Challenges to Statutory Marijuana Prohibitions, 6 Conn. L. Rev. 601 at 686 (1974) 48

BONNIE, RICHARD and WHITEBREAD, CHARLES, The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition, 56 Va. L. Rev. 971 (1970) 39

HOUSTON POST, September 17, 1987, Sec. A, p. 13 46

OPINION BELOW

The opinion of the Court of Appeals of Texas, 14th Supreme Judicial District at Houston in Frank Ronald Rester vs. The State of Texas, No. C-14-84-00608-CR (App. A), was not published under decision of that Court as permitted by Texas Code of Appellate Procedure Annotated, (Vernon 1987), Vol. 6, Sec. 90(i). The opinion affirms the conviction and six year unprobated sentence and $3,000 fine (App. B) of the 262nd District Court of Harris County against Appellant on indictment alleging possession of more than four ounces and less than five pounds of marijuana as stated by the Texas marijuana prohibition law, Texas Revised Civil Statutes, Art. 4476-15, Sec. 4.051 (App. E).

JURISDICTION

This is a criminal proceeding in which the Appellant, a 50-year-old grandfather and building contractor with no prior criminal record, was

sentenced to six years in the Texas Department of Corrections. His motion for probation was denied by the trial court. The judgment of the 262nd District Court of Harris County, Texas was appealed to the Texas Court of Appeals.

The Judgment and Opinion of the Texas Court of Appeals, 14th Supreme Judicial District at Houston, is dated April 3, 1986. Motion for rehearing was overruled May 1, 1986 (App. C). Entry of the judgment and mandate was withheld pending submission and action upon Appellant's Petition for Discretionary Review in the Texas Court of Criminal Appeals. That Petition for Discretionary Review was denied May 20, 1987 and Appellant's Motion for Rehearing was overruled in the Court of Criminal Appeals on June 24, 1987 (App. C) at which time the judgment of the Texas Court of Appeals became final. After Stay of Mandate pending appeal to this Court, Appellant's Notice of Appeal (App. D) was filed July 23, 1987 in

the Texas Court of Appeals, 14th Supreme Judicial District at Houston, Texas. The Texas Court of Appeals is the highest court of Texas for the appeal of criminal, non-capital felony cases. Cases that sustain the jurisdiction of this Court are: Smith vs. Digmon, 434 U.S. 332 (1978); Lynk vs. LaPorte Superior Court; 789 F.2nd 554 (1986).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(2). Appellant asserted that the marijuana prohibition law of Texas (App. E) was unconstitutional under the United States Constitution drawing into question the validity of the marijuana prohibition law on the basis of its repugnance to the United States Constitution. The trial court overruled his written motion so asserting, and after raising the issue in Motions for Rehearing (App. N) the contention was mentioned neither in the Opinion of the Court of Appeals nor in the Summary Order overruling

Appellant's Motion for Rehearing. The Appellant's contention regarding the Texas Marijuana Prohibition Statute was ignored by the Texas Court of Criminal Appeals in their order denying Motion for Rehearing (App. C). The courts thus upheld the validity of the Statute sub silentio.

CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS INVOLVED

1. U. S. Constitutional Amendments.
   I, IV, V, VI, VIII, IX, X, and XIV. (App. E)
2. Tex. Rev. Civ. Stat. Ann., Art. 4476-15, Sec. 4.051 (Vernon, 1985) pertinent part in (App. E).
3. Comprehensive Drug Abuse Prevention and Control Act of 1970; 21 U.S.C. Sec. 801 et seq, pertinent part in (App. E).
4. Single Convention on Narcotic Drugs, 1961;

T.I.A.S. 6298, 18 U.S.T. 1408 (1968) pertinent part in (App. E).

STATEMENT OF THE CASE

This is a criminal proceeding. The Appellant was charged initially on the day of his arrest, April 6, 1984 with possession of less than two ounces of marijuana in a misdemeanor court of Harris County, Texas, County Criminal Court at Law No. 6.

Appellant appeared twice in that court. On his first appearance May 1, 1984 (R.I of III-25) (App. F) Appellant waived his rights and pleaded guilty. Judge J. R. Musselwhite refused his plea on Form 488. Appellant appeared again on May 4, 1984 (R.I of III-24) (App. F) in open court. He waived all rights and offered guilty plea again. The Judge made a note, "Motion Form 488 previously denied again denied 5-4-84 J. R. Musselwhite". Beneath that entry appears the handwritten statement, "Case to be refiled as a felony. Misd. to be dismissed.

Lee N. Coffee, attorney for the State." On May 11, 1984 Appellant was indicted for possessing marijuana of more than four ounces but less than five pounds, a felony charge, in 262nd District Court of Harris County, Texas (R.I of III-6).

Appellant appeared three times and in each instance forms for agreed settings were filed (R.I of III-7, 8, 9). The second court appearance of May 23, 1984 (R.I of III-8) (App. G) contains the plea bargaining agreement in the words "8 years probation $1,000 fine - hold open D attorney motion double jeopardy to give me." On June 13, 1984 appellant appeared and the case was reset for motion to be heard July 6, 1984. The agreed setting form (R.I of III-9) (App. G) contains the notation of the Attorney for the State Pat Shelton. "Motions to be dispositive of case - if motions denied - defendant will plead for: 8 years probation $1,000 fine."

On July 2, 3, 1984 Appellant filed five pre-trial motions:

(1) "Motion to Quash Marijuana Statute Unconstitutional" (R.I of III-10-13) (App. H) contending that Tex. Rev. Civ. Stat. Ann., Art. 4476-15, Sec. 4.051, (Vernon 1985), hereinafter called "Texas Marijuana Prohibition Statute" is unconstitutional, vague and arbitrary; violating rights of the Defendant to equal protection of the laws and due process of law under the U.S. and Texas Constitutions.

(2) "Motion for Independent Chemical Analysis" (R.I of of III-14-16) stating that the Texas Marijuana Prohibition Statute was vague in its definition of marijuana "defendant has reason to believe that the atomic weight of the tetrahydracabinol contained in the marijuana sample he allegedly possessed is less than four ounces (and

probably less than one ounce) so that this Court may not have jurisdiction of the offense..."

(3) "Motion to Quash Marijuana Statute Violative of Religious Freedom: stating that "no compelling state interest exists in Texas to prevent religious freedom of expression or belief to members of liberal religious tradition in regard to their use of substances of vegetable origin which have hallucinogenic effects...there is no demonstrated socially inimical effect from the use of such substances which would justify the proscription of such use...the Texas law in this respect violates the text of the U.S. Supreme Court as to church-state relationships and freedom of expression in that it inhibits freedom of religion and serves no compelling interest of the State."

(4) "Motion to Suppress Unlawful Search and Seizure" (R.I of III-20), alleging facts of the arrest..."without warrant and without probable cause

in violation of Amendments IV, V and XIV of the U.S. Constitution...such arrests and searches were without probable cause as stated by the U.S. Supreme Court in Florida vs. Royer, 103 S. Ct. 1319 (1983) and People vs. Williams, 51 Cal. Appeals 3rd 346 (1975)," was a motion to suppress all statements written or oral made after the arrest.

(5) "Special Plea under Art. 27.05 Texas Code of Criminal Procedure - Motion to Quash - Former Jeopardy and Former Acquittal" (R.I of III-22-23). This motion stated that the action was first filed on complaint and information in County Criminal Court at Law No. 6, Harris County, Texas, filed under Cause No. 76-4341 in said Court. It further alleged that the Defendant had pleaded guilty and the Defendant's motion was refused by the Judge of said Court. "The subsequent indictment filed in this Court is therefore subject to this plea of former jeopardy. Defendant was entitled to waive

his rights and enter a plea of guilty. When he did waive his rights in writing, in open court, and requested that the Court accept said plea, Defendant was placed in jeopardy and the indictment subsequently returned in this Court is void in the U.S. and Texas Constitutions..."

On July 13, 1984 the case was set for hearing on pretrial motions and for disposition according to the notation on the setting form "Motions to be dispositive of case - if motion denied - defendant will plead to: 8 years probation $1,000 fine", (R.I of III-9) (App. G). Additional information concerning events at that hearing are contained in an Affidavit of the Undersigned in the Record, (R.I of III-86-93) (App. L). In the later opinion the Court of Appeals (App. A) the Court characterized this Affidavit as "self-serving" and disregarded the contents of the Affidavit.

At the hearing on pretrial motion on July 13, 1984 evidence on the double jeopardy motion was produced by the Appellant (R.II of III-3-7). No evidence was presented on the other motions. All motions were overruled except for the motion regarding Chemical Analysis. Appellant then pleaded guilty, (R.I of III-10-21) but the finding of guilt was postponed until September 7, 1984, (R.I of III-20-21).

In the Affidavit of the Undersigned (R.I of III-86-93) (App. L) events immediately following this hearing are described as "stormy confrontation in chambers." Such events included information given orally from a probation officer to the Judge that the Appellant was "uncooperative". Appellant and the undersigned orally informed the Judge a few minutes after the plea of guilty that the guilty plea was involuntary and was entered only because the State had breached the plea bargaining agreement

only minutes before the hearing on pretrial motions had begun. The State Prosecutor Rusty Hardin, who had breached the plea bargaining agreement, was also present in chambers at the time these oral reports were given to the trial Judge.

After these events the undersigned withdrew from the case and Appellant retained another attorney, Terry Collins, to represent him at the forthcoming hearing of September 7, 1984 (R.II of III-3). On August 21, 1984, before a finding of guilt, the undersigned filed an additional affidavit in 232nd District Court, Harris County, Texas, in an unrelated criminal case describing the breach of a plea bargaining agreement in this case on July 13, 1984 (R.I of III-94-99) (App. L).

At the September 7, 1984 hearing Appellant was found guilty (R.III of III-3) and a presentence report was considered. The report contained certain hearsay information accusing Appellant of selling

marijuana, although Appellant was only charged with possession of marijuana. The trial Judge had, apparently, from his comments in the Record read the report in advance of the hearing which opened with a finding of the Appellant's guilt (R.III of III-3). The attorney for Appellant objected to the hearsay in the presentence report and objection was sustained (R.III of III-5).

The Prosecutor further argued without objection from Appellant's attorney "We are talking about approximately 2 pounds of marijuana. His youngest boy who has no reason to lie says that they were going to pay for the trip, come back into the country and pay for the trip using the money they earn from the marijuana. This person here sells it. He uses it and he doesn't consider that to be wrong." Immediately after this argument by State's attorney the Court sentenced Appellant to six years in the Texas Department of Corrections (R.III-47).

Following the sentencing hearing of September 7, 1984, Appellant retained another attorney, Paul Licata, to file the Motion for New Trial (R.I of III-74-75). It alleged that the guilty plea was coerced. That motion was overruled without a hearing, leaving no evidence in the appellate records, at that time, that a plea bargaining agreement had been breached by the State in a manner violating the holding of this Court in Santobello vs. New York, 404 U.S. 257 at 266 (1971).

The failure to request a hearing on the Motion for New Trial by Appellant's attorney at that time, Paul Licata, left the appellate record silent on Appellant's contention that his constitutional rights had been violated in the trial court and off the Record of the case.

On December 27, 1984, while the trial court still had jurisdiction and prior to the appeal, Appellant made an effort to remedy the failure of

Paul Licata to request a hearing so that evidence could be entered into the appellate record. This failure of Paul Licata was alleged to be ineffective assistance in Appellant's Court of Appeal's Brief but this contention was ignored in the Court's Opinion (App. A). Appellant filed his "Motion to Withdraw Judgment from the Record as Void and Motion for the Court to Include Additional Material in the Record as Objection to the Record" (R.I of III-79-83) overruled the same day. The affidavit of the undersigned was attached to that Motion. A further exhibit to the affidavit was a motion the undersigned had filed before the finding of guilt in an unrelated criminal matter in 232nd District Court on August 21, 1984, describing the state's breach of plea bargain agreement in this court. The significance of the Motion attached as an exhibit from 232nd District Court was that the same described how the State breached the agreement in a

document filed before any finding of guilt in this case. (R.I of III-84-99) (App. L).

Concerning Question Three of denial of first appeal as of right, the Opinion (App. A), makes reference to an affidavit of the undersigned which was included in the Record, pursuant to Tex. Crim. Proc. Code Ann. Sec. 40.01 (Vernon 1985). The Opinion states:

"Mr. Funderburk filed an affidavit attached to an untimely motion to withdraw approval of the Record in which he concedes giving erroneous advice to Appellant. This self-serving affidavit is not properly in the Record and does not constitute evidence sufficient to support Appellant's assertions. Keith vs. State, 232 S.W. 321, 325 (1921).

With the above quoted statement, the Opinion infers that the Affidavit of the Undersigned raised questions only as to a concession of the undersigned that he gave erroneous advice to the Appellant.

This inference is incorrect. The Affidavit contains allegations raising constitutional questions as to many other aspects of the proceedings in the trial court. Some of the constitutional questions posed by the said Affidavit of the undersigned (and thus disregarded by the Court of Appeals' Opinion), include the following five constitutional violations of Appellant's rights in the trial court.

(1) the possible motivation by reason of religious discrimination of the State prosecutors in this case arriving at a decision to breach a plea bargaining agreement;

(2) the untimely and coercive manner in which the State prosecutor, Rusty Hardin, called off the plea bargaining agreement only moments before a court hearing (of July 13, 1984) on Appellant's pretrial motions (including a motion to suppress in which Appellant had not brought evidence to the

hearing in reliance on the plea bargaining agreement);

(3) the prompting a coerced guilty plea entered in violation of the holding of this Court in Santobello vs. New York, supra;

(4) allegations that immediately following the entry of the guilty plea (which was not then accepted by the Judge of the trial court but deferred until later sentencing hearing of September 7, 1984) the Judge of the trial court received an oral report from a probation officer that Appellant was "uncooperative"; (R.I of III-92) (App. L).

(5) the Judge of the trial court was personally informed that the plea was involuntary immediately after the oral report by the probation officer, by the Appellant and by the undersigned.

Notice of Appeal had been timely filed in the trial court for appeal to the Texas Court of Appeals, 14th Supreme Judicial District at Houston

(R.I of III-59). Appellant filed in the Texas Court of Appeals a "Motion to Abate" (App. J) on July 31, 1985, in order to reassert his objection to the incomplete Record concerning the alleged breach of the plea bargaining agreement mentioned in the affidavit of the undersigned. That motion was overruled on August 8, 1985. The case was remanded from the Court of Appeals on its own motion, however, for the limited purpose of determining whether the undersigned or Mr. Paul Licata represented the Appellant on appeal. At the hearing held June 25, 1985 in the 262nd District Court, it was determined that the undersigned would be representing the Appellant on appeal (R.II of II-11-12). After that hearing, Appellant filed a supplemental motion to remand in the Court of Appeals (App. K). The motion was based on the Appellant's need to have a complete appellate record in order to have a meaningful right of appeal.

The Supplemental Motion to Abate cited to the Court of Appeals in the new decision of this Court in the case of Evitts vs. Lucey, supra, stating the first appeal as of right ruling under the Sixth Amendment. The motion was overruled by the Texas Court of Appeals on August 8, 1985 (App. K).

Oral argument was held on November 25, 1985. During oral argument the undersigned was asked by a judge about Appellant's contention that the marijuana statute was unconstitutional. The undersigned replied to the question by stating that both the undersigned and Mr. Rester considered this case an opportunity to challenge the Texas marijuana prohibition statute and that he had filed in the trial court a motion so stating. Appellant's contention on the invalidity of the marijuana prohibition law was not raised in Appellant's brief or rejoinder brief in the Court of Appeals but was raised in

motions for rehearing in that court and the Court of Criminal Appeals.

This sentence is probably the longest in the history of Harris County, Texas, since 1973.* It was clear that the Texas Court of Appeals was bound to take judicial notice of any fundamental jurisdictional defect in the case.

On April 3, 1986 the Opinion and Judgment of the Texas Court of Appeals was issued affirming the conviction. Motion for Rehearing was filed on April 18, 1986 and was overruled on May 1, 1986. In his Motion for Rehearing in the Court of Appeals

---

* The Disparity in sentencing between cases involving marijuana prohibition is notable, Appellant having been sentenced for possession of between 4 ounces and 5 pounds of marijuana to six years in the penitentiary, unprobated and a fine of $3,000.00, while the defendant in Garrett v. United States, 105 S.Ct. 2407 (1985) was convicted of importation of 12,000 pounds of marijuana was fined $15,000 and sentenced to five years in prison.

(App. N), Appellant addressed double jeopardy, first appeal as of right and unconstitutionality of Texas Marijuana Prohibition Statute, inter alia, as issues.

The finality of the Judgment of the Court of Appeals affirming the conviction was delayed due to Appellant's Petition for Discretionary Review in the highest criminal court of Texas, the Texas Court of Criminal Appeals on June 13, 1986. Appellant had no right of appeal in Texas except on petition for discretionary review since his conviction was less than a capital crime.

The petition for discretionary review in the Texas Court of Criminal Appeals did not raise the issue of the constitutionality of the Texas marijuana prohibition statute. However, it did include all other points raised herein. The petition was denied without opinion on May 20, 1987.

In the Motion for Rehearing in the Court of Criminal Appeals filed June 4, 1987 and overruled June 24, 1987, Appellant raised the unconstitutionality of the Texas marijuana probition law, double jeopardy, and other points of error raised in this Court. Notice of Appeal to the U.S. Supreme Court was filed July 23, 1987 (App. D).

Appellant's double jeopardy assertion, a motion which had been overruled in the trial court as above described, was again asserted in the Texas Court of Appeals in the Motion for Rehearing where it was timely because it was jurisdictional and cognizable at any stage of the proceedings. In Appellant's Petition for Discretionary Review in the Texas Court of Criminal Appeals double jeopardy was again raised in the Petition (App. N), which was refused without hearing (App. C).

Appellant's contention that his Fifth Amendment Right to a presumption of innocence as due process

of law was violated was raised in Appellant's Brief in the Court of Appeals on a Motion for Rehearing and in the Petition for Discretionary Review in the Texas Court of Criminal Appeals. The Court of Appeals obliquely discussed that matter, (App. A) concerning the argument of the prosecutor regarding the uncharged offense. The contention was otherwise ignored in the opinion.

Appellant's contention that the trial court had no jurisdiction because the uncorroborated Judicial Confession was the only evidence of the judicial fact of the weight of the marijuana was raised in the Court of Appeals in his Rejoinder Brief, but the point was ignored in the Opinion of the Court of Appeals. The point was reasserted on the Motion for Rehearing which was summarily overruled (App. C) and again in the Petition for Discretionary Review in the Texas Court of Criminal Appeals, also summarily overruled (App. C).

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

QUESTION ONE: CHALLENGE TO THE MARIJUANA PROHIBITION LAWS

"While there is no confirmed report of a human ever having died from an overdose of cannabis, the toxic levels of THC have been determined from tests on animals. The lethal dose for marijuana is approximately 40,000 times the dose needed to achieve intoxication. The equivalent ratio of intoxicating to lethal dose for alcohol is 4/10 and for barbiturates is 3/50."

-Ravin v. State, 537 P.2d 494 (Alaska, 1975)

"Mr.Snell. 'What is the bill?'
Mr. Rayburn. 'It has something to do with something that is called marijuana. I believe it is a narcotic of some kind.'

-Colloquy on the House floor prior to passage of the Marijuana Tax Act (1931). 56 Va.L. Rev. 971.

"In recent years, close to 400,000 people have been arrested each year for marijuana-related offenses despite the general nonenforcement of criminal sanctions for use (Federal Bureau of Investigation, 1980)

-National Research Council, "An Analysis of Marijuana Policy", P.15, (1982).

This criminal case is but the play of costly legal illusion. There are no valid laws in the

United States against the possession, use, or sale of marijuana.

A reasonable set of laws regulating marijuana possession, use, and sale according to scientific observation of its effects on minors, like the laws concerning alcohol or tobacco, would be constitutional and genuine, of course, but such laws do not exist.

Your Appellant, the undersigned attorney, and millions of other citizens, faultless of observance of law properly within the bounds of social contract, find that contumacy is not an unreasonable response to marijuana prohibition laws. Guilt is absolutely out of the question. The Ninth Amendment clearly limits government involvement beyond social contract.

Your Appellant, not unlike American forebearers who found the former colonial tax on tea noxious in the absence of constitutional observance, declares

now in this Court to the acclaim, loudly or silently, of all free and informed citizens that he has no guilt on possession or use of marijuana at any time or place in this country.

Reason and decency, as found within a gentle, enlightened society, may be restored by candor. By such candor and openness may the Constitution itself be spared social irrelevance and brought back to the vitalizing reality of nowness.

In the Single Convention on Narcotic Drugs; 18 U.S.T. 1408 (1961) T.I.A.S. 6298, hereinafter called "Treaty", (App. E) formalized in the United Nations to repace earlier treaties of a similar nature regarding drugs, the national parties declared that the use of cannabis must be discontinued as soon as possible but in any case within twenty-five years from the effective date of the Treaty. Six years after the Treaty, however, cannabis in the United States and many other countries suddenly came into

popular use by parts of the population who had never previously used it. An Analysis of Marijuana Policy, (P.1, Supra), states that in 1979, 68 percent of young adults between the ages of 18 and 25 reported having tried marijuana; 35.4 percent reported having used marijuana in the past month.

This Court last heard a case regarding the marijuana prohibition laws in Leary v. U.S. 395 U.S. 6 (1969). Vast changes in our social perception concerning the marijuana prohibition laws followed the Leary decision, supra. A need for the exercise of the general supervisory role of this Court is indicated by changes in scientific, legal, and social content of the question. The national need for a review of the marijuana prohibition laws also is indicated by the embryonic phase of drug testing of employees in the workplace. A flood of further litigation has begun as a mere trickle which

promises to create an entire new field for attorneys and courts.

Scientific results have been published in three major reports*. This research invalidates ethnocentric myth which is the foundation for marijuana prohibition.

> As stated in Chastleton Corp. v. Sinclair, 264 U.S. 547 (1924);
>
> "...as a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared."
>
> and in Abie State Bank vs. Bryan, 262 U.S. 765 at 772 (1931):
>
> "The Principle that a police regulation, valid when adopted, may become invalid because in its operation it has proved to be confiscatory, carries with it the recognition of the fact that earlier compliance with the regulation does not forfeit the right to protest when the regulations becomes intolerable".

Despite continued prohibition, use of marijuana continued to increase. Penalties were lowered in many States. In eleven States, possession of small

amounts of marijuana was made punishable by fine only without jail time, a shift from complete to partial prohibition (**). This change in the prohibition laws has had little effect on consumption patterns in those States(***).

The continued judicial concern with marijuana prohibition laws is shown by decisions in People v. McCabe, 49, 275 N.E.2d 407 (1971); People v. Lorentzen, 194 N.W.2d 827 (1972); People v. Sinclair, 194 N.W.2d 878 (1972); English v. Miller, 341 F.Supp.

---

* National Commission on Marijuana and Drug Abuse, Marijuana, A Signal of Misunderstanding (1972)

National Research Council, An Analysis of Marijuana Policy (1982)

National Research Council, Marijuana and Health, (1982)

** An Analysis of Marijuana Policy Supra. Pg. 7

*** Ibid, Pg. 14

714 (1972) rev'd sub nom English v. Virginia Probation & Parole Board, 481 F.2d 188 (1973); State v. Kantner, 493 P.2d 306 (1972), United States v. Kiffer, 477 F.2d 349 (1973).

The Alaska Supreme Court decision in Ravin v. State, supra, can be examined in juxtaposition to the decision in State v. Kantner, supra. The Alaska case, Ravin v. State, supra, is a decision based on the Right of Privacy, Griswold v. Connecticut, 381 U.S. 557 (1969); and Stanley v. Georgia, 381 U.S. 479 (1965). That decision turned on a provision of the Alaska Constitution.

The cruel and unusual punishment aspects of the marijuana prohibition laws are also aspects of their unconstitutionality upon which your Appellant would expound more fully upon noting of probable jurisdiction.

The marijuana prohibition laws chill and freeze First Amendment rights. Because of these laws,

proponents of change often find themselves choosing silence over confrontation because speaking out would mean effectively self incrimination.

Since marijuana is criminalized, advocates of reform of such laws by legislative method are disenfranchised as effectively as were the urban populations of Tennessee described in the case of Baker v. Carr, 369 U.S. 186 (1964). The "one man, one vote" rule of Baker v. Carr, supra, is violated as to the specific subject matter of marijuana law reform, effectively freezing free speech as guaranteed under the First Amendment. That is, the legislative body cannot be approached effectively by advocates of marijuana law reform. There cannot be such a legislative constituency as long as advocacy of reform of such laws implies personal criminality. As to the First Amendment rights for the advocates of marijuana law reform, one might well contemplate a news item appearing in The Houston Post (Sept. 17,

1987, Sec. A, P.13). A marijuana farmer near Lexington, Kentucky, allowed himself to be photographed with a marijuana plant in hand for the Lexington Herald-Leader. He went public with "our side of the story". The ensuing attention and harrassment from law enforcement is described in the news story.

The disenfranchisement of proponents of marijuana reform prevents legislative response appropriate to the scientific revelations of recent years. These revelations conclusively establish that the illegal substance, marijuana is far less toxic than the effects of tobacco and alcohol.

> "The federal regulations, however, govern importation, manufacture, and to some extent distribution, of alcohol and tobacco. The critical fact is that any adult may import, manufacture, or distribute alcohol or tobacco without fear of criminal sanctions merely by complying with the licensing and record-keeping requirements. Any adult may possess and use those drugs without fear of any criminal sanctions whatsoever on such conduct. A person

> who wishes to distribute or possess or use marijuana has no such option; distribution, possession, or use of any amount subjects him to penal sanctions." 6 Conn. L. Rev. at 640 (1974)."

By contrast, the legislative and executive response to scientific revelations concerning the toxicity of tobacco and alcohol has been active indeed. This openness allowed by such legalization has brought about warnings on cigarette packs, prescribed smoking areas, age requirements for purchase of these drugs, drunk driving laws, etc. Any attempt to decriminalize the use of marijuana through legislative means is effectively, but unconstitutionally, stifled as were the urban residents advocating reapportionment of the Tennessee legislature in Baker v. Carr, supra. This fact and its First Amendment implications show clearly that Appellant's contention is properly addressed by judicial rather than legislative advocacy. When the unconstitutional exercise of

governmental power has effectively disenfranchised citizens as proponents of marijuana law reform, the remedy is surely judicial, not legislative, in character. In the absence of judicial action to enforce the constitution invalidating these laws the criminalization of marijuana is self-perpetuating.

In Question One, Appellant includes in the question the related implication asserting that the federal marijuana prohibition law and treaty reference to marijuana as a "narcotic" have received intense judicial scrutiny in State v. Zornes, 469 P.2d 552 (1970); People v. Sinclair, 194 N.W.2d 878 (1972); English v. Miller, 481 F.2d 188 (1973); Sam v. State, 500 P.2d 291 (1972); People v. Summit, 517 P.2d 850 (1974).

Since Appellant did not challenge the federal marijuana prohibition statute nor the Treaty in the Texas courts below, it might be questioned as to whether the validity of those laws was "drawn into

question" (28 U.S.C., Sec. 1257(2) by Appellant's challenge to the Texas marijuana prohibition law in the courts below. The relationships between the state marijuana prohibition laws and the federal law also prohibiting marijuana, and the relationship of the federal law to the Treaty, operate in a unitary fashion so that states are not in fact free to adopt a scheme of regulated marijuana use. As stated in Analysis of Marijuana Policy, supra, p. 29:

> "The 1961 Single Convention on Narcotic Drugs, which now obligates the U.S. government to prevent the importation of marijuana and to prohibit the adoption of a licensing system by any state, is a serious (although not an insurmountable) obstacle to the adoption of a federal regulatory policy and the development of state licensing. The treaty allows a signatory to terminate its adherence to the agreement at any time after two years from the date of the convention. Of course the general impact of any move to withdraw from the convention includes a broad foreign policy context, which is beyond the expertise of this Committee to judge."

The Texas courts below did not offer an effective forum for challenge to the federal prohibition or the treaty. However, Appellant would show the Court on noting of probable jurisdiction that the validity of the federal law and the treaty is a "subsidiary question fairly included" within Appellant's first question herein. (S. Ct. Rule 15.1(a)).

With the vision of joining the constitutional tradition with the demands of nowness, Appellant challenged the unconstitutional marijuana prohibition law of Texas before a trial judge who was less than bemused in pronouncing a six year penitentiary sentence and a $3,000 fine. A probated six-month sentence would have been more usual in local judicial practice.

Historical cultural preferences in the choice of drugs do not constitute a compelling state interest in criminalization of non-destructive

preferences or conduct. When, under the ruling in this case, the criminalization is removed as unconstitutional, a rational discrimination from scientific observation can begin. Legislative determinations may be required by regulated but permitted usage. Fortunately, science and the Alaskan experience of domestically permitted use since 1975 of marijuana indicate that the use of marijuana is a non-destructive personal preference which cannot be constitutionally criminalized as Appellant would show the Court on grant of plenary consideration with oral arguments and briefs.

QUESTION TWO: DOUBLE JEOPARDY

This case is a substantial federal question. To the knowledge of the undersigned this question of double jeopardy under Amendment VI of the United States Constitution has not been decided with specificity clearly applicable to the case. Therefore, this case appears to be one close to a case of

first impression. As pointed out in Ochoa v. Estelle, Jr., 445 F.Supp. 1076 at 1081 (1977) and again in Crist v. Bretz, 437 U.S. 28 (1978) the Court quoted with approval its former rationale on the reason for the rule of double jeopardy from Green v. United States, 355 U.S. 184 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

In Crist v. Bretz, supra, and in its language quoted in Ex Parte Myers, 618 S.W.2d 365 at 368 the court further observed the defendant's valued right to have his trial completed by a particular tribunal is now within the protection of the constitutional guarantee against double jeopardy.

An offer of a guilty plea in a misdemeanor court may be refused, of course, for any one of several well recognized reasons, as the U. S. Supreme Court observed in Kercheval v. United States, 274 U.S. 220 at 223 (1927):

> "Other decisions support the petitioner's contention that a plea of guilty withdrawn by leave of court is not admissible on the trial of the issue arising on the substituted plea of not guilty (citations omitted). We think that contention is sound. A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound (citations omitted). But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear, or inadvertence. Such an application does not involve any question of guilt or innocence."

Although there are recognized reasons for the refusal of a guilty plea, Kercheval v. United States, supra, it does appear that double jeopardy will attach when a guilty plea is offered but is improperly refused. The Florida Supreme Court in the case of Brown v. State, 367 So.2d 616 at 620 (1979) stated:

> "We have held that jeopardy attaches on an unconditional guilty plea when the plea is or should have been accepted and on a conditional plea which is accepted on conditions favorable to the defendant."

The above quoted observation on guilty pleas that should have been accepted appears consistent with many other cases, including several from other states discussed by the Colorado Supreme Court in the case of Markiewicz v. Black, 330 P.2d 539 at 542 (1958), wherein the Court quoted with approval from the case of State v. Blackwell, 200 P.2d 698, 198 P.2d at 284 (1948):

"If, through some failure of procedures, the plea of guilty has not been followed by judgment and sentence, the accused is nevertheless protected from another trial on the same charge. As against any new charge for the same offense, he may plead the former conviction."

QUESTION THREE: FIRST APPEAL AS OF RIGHT

The court of Appeals in its opinion destroyed Appellant's right to effective assistance of counsel on his "first appeal as of right" in Texas courts. The opinion states:

"Nothing in the record supports appellant's contention that he received erroneous advice from his attorney regarding the effect of his guilty plea on his right to appeal his pretrial motions. Mr. Funderburk filed an affidavit attached to an untimely motion to withdraw approval of the record in which he concedes giving erroneous advice to Appellant. This self-serving affidavit is not properly in the record and does not constitute evidence sufficient to support Appellant's assertions. Keith v. State, 89 Tex. Crim. 264, 232, S.W. 321, 325 (1921). Appellant's second ground of error is overruled (App. A)."

In disregarding the affidavit, the Court of Appeals denied Appellant his right of effective assistance of counsel on appeal. Appellant's attorney, the undersigned, admits in the disregarded affidavit that he advised Appellant to lie to the trial court in response to the anticipated question of the trial judge on entering the guilty plea and to state that the plea was being entered freely and voluntarily. According to the affidavit, the plea was being entered under coercion resulting from the State's breach of plea bargain agreement.

The Opinion of the Court of Appeals makes much of emphasizing that there is presumably no evidence that the plea was other than voluntary and true. If the affidavit of the undersigned is true, this emphasis in the opinion is false and not only the right to effective assistance of counsel on appeal was denied but many other constitutional rights of Appellant described in the affidavit (but otherwise

off the Record) were obviated by disregarding the affidavit which was contained in the record, having been duly certified (R.I of III 102) as a part of the record by the Judge of the trial court in regard to giving "erroneous advice" to the Appellant the affidavit states:

> "The unfairness of Mr. Hardin's action was discussed with Mr. Rester and myself and we definitely wanted to appeal. Although the plea was being coerced by Mr. Hardin's breach of the agreement, we did not intend to be intimidated by this illegal action. In order to enter a guilty plea it would be necessary to tell the court that the plea was voluntary and this point was discussed with Mr. Rester before announcing to Mr. Hardin our decision on disposition of the case. I told Mr. Rester that he may say yes to voluntariness of the plea or it would not be accepted by the Court. Before any guilty plea, however, the undersigned was to present the pretrial motions but had not prepared any evidence to support them, especially the motion to suppress, because the plea bargaining agreement prohibited it; consequent- ly, no witnesses had been called and no evidence prepared on any motion (R.I of III 89-90) (App. L)."

Whether the affidavit is true is not the question that the Court of Appeals had to decide. On appeal, the Court of Appeals was only requested on appeal to remand the case for an investigation of the contents of the affidavit of the undersigned in Appellant's Motion to Abate and Supplemental Motion to Abate (App. J and K). The court denied those motions in advance of oral argument and in advance of the announcement of the decision, but in holding that there was no evidence to support Appellant's "assertions" the Court of Appeals has only itself to blame (not the Appellant) because the Court of Appeals had denied Appellant the right to present such evidence on remand of the case. Loss of Appellant's right to assert his U.S. constitutional rights is a "double bind" or "catch-22" application of a state procedural rule against self serving documents or those filed after the time allowed on motion for new trial and is surely a violation of

Appellant's rights announced in Evitts v. Lucey, supra. The long and the short of it is that the Court of Appeals believed that Appellant's attorney, the undersigned was lying during the appeal, rather than accepting that Appellant's guilty plea was a lie in the trial court. Since the Court of Appeals thought that the undersigned was lying to them in the affidavit and in open court on oral argument, they concluded, incongruously, that Appellant should be convicted and serve six years in the penitentiary and pay a $3,000 fine. Surely such an unjust result would have been avoided had the Court of Appeals cared to investigate the truth of allegations in the affidavit by simply granting appellant's two motions to remand. If the affidavit is true, then the opinion of the Court of Appeals would be suspect in stating:

"The record fails to show that the state withdrew a plea bargain agreement upon which the Appellant had relied to his detriment" (App. A).

The above ruling by the Court of Appeals is suspect since the Court of Appeals had by its own ruling prevented Appellant from adducing such evidence upon remand of the case for investigation into how the plea bargain agreement was breached on July 13, 1984 (App. J, K). The record does show that there was a plea bargaining agreement prior to that date (R.I of III 8-9) for on the court forms the prosecuting attorney had entered two notations: "8 years probation $1,000 fine - hold open - Defendant's attorney motion double jeopardy to give me" and "motions to be dispositive of case - If motion denied - defendant will plead to 8 years probation $1,000.00 fine" (App. G).

QUESTION FOUR: PRESUMPTION OF INNOCENCE

A substantial federal question is raised in this case about whether Fifth Amendment due process of law rights to a presumption of innocence were violated by three incidents. The three incidents were (1) the alleged oral report of a probation officer to the Judge of the court off-the-record was alleged in the Affidavit of the undersigned (R.I of III 91-92); (2) the examination of the presentence investigative report by the Trial Judge in advance of a finding of guilt (R.III of III 3), and (3) the manifestly improper argument of the State prosecuting attorney arguing in a sentencing hearing that Appellant was guilty of selling marijuana, an uncharged crime (R.III of III 4-6).

Question Four, herein, is a substantial federal question as to whether the States may, without violating Amendments Six and Fourteen of the U.S.

Constitution, allow State courts to receive off-the-record orally presented reports from probation officers in advance of a finding of guilt, said presentence reports containing hearsay allegations that the accused, the Appellant, was guilty of additional uncharged offenses.

The oral report of the probation officer that Appellant was "uncooperative" in advance of a finding of guilt and out of the presence of Appellant or his attorney constituted a violation of Appellant's rights under U. S. Constitutional Amendment VI. In U.S. v. Wade, 388 U.S. 218 at 226, 226 (1967) the Court stated:

> "It is central to the principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, "in court or out" where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of other

guarantees of the Sixth Amendment....right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have impulsory process for obtaining witnesses against him and to have impulsory process for obtaining witnesses in his favor. The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused interests will be protected consistently with our adversary theory of criminal prosecution. CF Pointer vs. Texas, 380 U.S. 400."

The use of presentence investigations in the State criminal proceeding is a daily concern across the United States. As instant case illustrated, the State procedure to protect the presumption of innocence under the Fifth Amendment is often neglected to the detriment of the constitutional observance. It is a substantial federal question.

QUESTION FIVE: ABSENCE OF TRIAL COURT JURISDICTION

The question concerns the Fifth Amendment affect on court jurisdiction when the proported judicial confession (executed in 262nd District

Court) had no evidence, stipulated orally or otherwise, to support it in regard to the jurisdictional weight of the marijuana. The United States Supreme Court will notice lack of jurisdiction. United States v. Corrick, 298 U.S. 435 (1936).

Question Five presents a subtle but common point of discrimination on jurisdiction which is of daily importance for all prosecutors in all courts, to wit, the necessity for corroborating evidence supporting a confession on the jurisdictional matter. On this point there is a difference in jurisdictional matters and non-jurisdictional matters. Even if we presume that the possession was actual rather than constructive, here the presumption that the Appellant could have the superhuman ability to distinguish 3.999 ounces from 4.001 ounces without showing that he weighed the substance on scales is a manifestly absurd presumption which

is the difference between misdemeanor penalties and felony penalties. In instant case, the Record is silent on this matter, and he confessed to both possession of less than two ounces (R.I. of III 24, 25; 32) and more than four ounces in reference to the same marijuana. It cannot be said that such presumptions satisfy "proof beyond a reasonable doubt".

A substantial federal question is here presented. When State court jurisdiction of an offense of marijuana possession is made dependent on the weight of the marijuana possessed and the only evidence of the weight of the marijuana is the written judicial confession of the accused who may never have seen or weighed the marijuana (possession of which may have been constructive rather than actual for aught that appears in the indictment or the judicial confession), State presumption of jurisdiction in the State felony court is violative of U. S. Constitutional Amendments V and XIV.

CONCLUSION

For the reasons stated above, Appellant submits that this appeal brings before the court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument for their resolution, and that probable jurisdiction should be noted because of the substantial question that exists due to the questionable constitutionality of the Texas marijuana prohibition statute, The Federal Marijuana Prohibition Statute, and similar statutes of all other States. Appellant has properly and fully raised in the Texas Courts the substantial federal question of whether the marijuana prohibition law of Texas, under which Appellant was charged, is unconstitutional. If, however, the Court feels that there is no substantial federal question so presented, Appellant requests that the Court consider this jurisdictional

statement as Petition for Writ of Certiorari pursuant to 28 U.S.C., Sec. 2103.

Dated Dec. 15, 1987

Respectfully submitted,

Paul D. Funderburk

Paul D. Funderburk

Attorney for Appellant

1401 Rosalie, Suite 2

Houston, Texas 77004

(713) 524-6144

(713) 777-0806

PROOF OF SERVICE

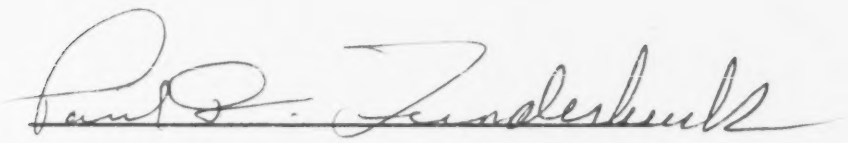
I, Paul Dow Funderburk, attorney for Frank R. Rester, appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 15th day of December, 1987, I served copies of the foregoing Jurisdictional Statement on all parties required to be served herein as follows:

On the State of Texas by leaving copies thereof at the office of Mr. J. Harvey Hudson, Assistant District Attorney, Appeals Division, 201 Fannin, Houston, Texas 77002 and

On the State of Texas by mailing copies in duly addressed envelope by certified mail, postage

prepaid to State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711 and Jim Mattox, Attorney General of Texas, Supreme Court Bldg., Capitol Station, Austin, Texas 78711

On the United States by mailing copies in duly addressed envelope, certified mail, postage prepaid to the Solicitor General, Department of Justice, Washington, D. C. 20530 as 28 U.S.C. Sec. 2403(a) may be applicable and Rule 28.4(b) Supreme Court Rules is applicable.



Paul Dow Funderburk

Attorney for Appellant, Frank Rester

1401 Rosalie, Suite 2

Houston, Texas 77004

(713) 524-6144

(713) 777-0806

APPENDIX A

Affirmed, and Opinion filed April 3, 1986.

FRANK RONALD RESTER, APPELLANT

No. C14-84-00608-CR VS.

THE STATE OF TEXAS, Appellee

----- -----

Appeal from the 262nd District Court

of Harris County

Trial Court No. 403245

----- -----

O P I N I O N

Frank Ronald Rester appeals a conviction for possession of marijuana. After appellant plead guilty, the judge assessed punishment at six years imprisonment and a fine. In his six grounds of error appellant alleges that the state illegally breached the plea bargain agreement; his counsel was

ineffective at both the guilt/innocence and punishment phases of the trial; his guilty plea was involuntary; the trial court improperly considered the presentence investigation report; and the evidence is insufficient to support the conviction. We affirm.

On returning from a Jamaican vacation, appellant was arrested at Houston's Intercontinental Airport with more than four ounces of marijuana on his person. Appellant filed several pretrial motions which were set to be heard on July 13, 1984. On that date appellant presented evidence on his motion to quash on the grounds of former jeopardy and former acquittal. AFter the former jeopardy motion was overruled, appellant announced he would not present any evidence on his other pretrial motions and requested the court to rule on them. The court overruled appellant's two motions to quash the indictment and his motion to suppress evidence

on grounds of unlawful search and seizure. The court granted appellant's motion for independent chemical analysis. After the motions had been ruled on, appellant announced he wished to enter a plea of guilty. The prosecutor stated he had no agreed recommendation. The court admonished appellant regarding his guilty plea and informed him no plea bargain agreement existed. At that time the following dialogue occurred:

THE COURT: If you are eligible for probation the minimum punishment is two years probation and the maximum is 10 years confinement in the Texas Department of Corrections and a fine of five thousand dollars.

You understand I know nothing about the case at this time. I'm no committing myself as to what your punishment will be. It might be probation and might

be time to serve in the Texas Department of Corrections. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You have no idea and I have no idea. I don't know anything yet, Understand? Is that right?

THE DEFENDANT: I understood that there was a note by a previous prosecuting attorney that you aware of.

DEFENSE COUNSEL: Yes. We are not talking about - we were talking about the right to appeal that we had discussed with the Court on previous negotiation.

THE COURT: You'll have a right to appeal but you have no idea, do you , that I have committed myself to giving you a probated sentence?

THE DEFENDANT: Right.

THE COURT: I may put you in the penitentiary.

THE DEFENDANT: Yes.

THE COURT: I may not, but we will find it out when we have the sentencing hearing. Do you understand that?

THE DEFENDANT: Yes.

The Court further admonished appellant concerning the effect of the stipulation of the evidence, judicial confession and waiver of constitutional rights appellant had signed. Both appellant and appellant's attorney stated that appellant knowingly and voluntarily entered his guilty plea.

The Court withdrew the finding of guilt, ordered a pre-sentence investigation and scheduled the punishment hearing for September 7, 1984. At the September 7th hearing, the Court examined the pre-sentence investigation report, heard character witnesses, found appellant guilty based on the guilty plea, and set punishment at six years imprisonment and a fine.

Appellant's first ground of error alleges the state illegally breached a plea bargain agreement which caused appellant to be unprepared to present evidence on his motions. Appellant claims he arrived at the July 13th hearing expecting to enter into a plea bargain agreement for probation and a $1,000 fine to which the state had previously agreed. In reliance on the agreement he was unprepared to present evidence on his motions. At that time appellant was informed that the state would not make a recommendation as to punishment. Being unprepared to present evidence on his motions, appellant chose, on the advice of his attorney, to enter a guilty plea rather than reset the case for jury trial.

The record fails to show that the estate withdrew a plea bargain agreement upon which the appellant had relied to his detriment. A defendant has no right to demand that the state enter into a plea

bargain. DeRusse v. State, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979). The prosecutor specifically told the trial court he would make no recommendation before appellant entered his plea. Only when a plea bargain agreement is accepted by the trial court does it become a contract which binds the state. Ex Parte Williams, 637 S.W.2d 943, 947 (Tex. Crim. App. 1982) cert. denied U.S., 103 S.Ct. 2458 (1983). In this case no agreed recommendation was ever made, much less accepted by the trial court. Appellant's first ground of error is overruled.

Appellant's second and third grounds of error allege ineffective assistance of counsel and involuntariness of the guilty plea. During the course of the proceedings appellant changed counsel three times. At the July 13th hearing and on this appeal, appellant employed Mr. Paul Funderburk as counsel. Appellant alleges that Mr. Funderburk provided ineffective assistance by advising

appellant that by pleading guilty he would preserve his pretrial motions for appeal. Appellant contends his guilty plea was involuntary because the trial court knew the plea was predicated upon appellant's erroneous belief that by pleading guilty he preserved his pretrial motions for appeal.

Nothing in the record supports appellant's contention that he received erroneous advice from his attorney regarding the effect of his guilty plea on his right to appeal his attorney regarding the effect of his guilty plea on his right to appeal his pretrial motions. Mr. Funderburk filed an affidavit attached to an untimely motion to withdraw approval of the record in which he concedes giving erroneous advice to appellant. This self-serving affidavit is not properly in the record and does not constitute evidence sufficient to support appellant's assertions. Keith v. State, 89 Tex. Crim. 264, 232 S.W.

321, 325 (1921). Appellant's second ground of error is overruled.

At the July 13th hearing both appellant and his counsel Mr. Funderburk assured the court that appellant's guilty plea was voluntarily and knowingly made. After the trial court carefully admonished appellant regarding the effect of his guilty plea, appellant still stated he wished to enter the guilty plea. A defendant cannot vitiate a careful plea-taking proceeding y later contending he swore falsely. United States v. Barrett, 514 F.2d 1241, 1243 (5th Cir. 1975).

Appellant contends the trial court knew his guilty plea was predicated upon his being able to appeal his pre-trial motions and thus should not have accepted the guilty plea. The court never specifically told appellant that he had a right to appeal his pre-trial motions. The trial court has no duty to warn against or correct all of a

defendant's misbegotten expectations of the scope of his appellate rights. Nycum v. State, 650 S.W.2d 91, 93 (Tex. App. Houston [14th Dist.] 1982, no pet.). Where no agreement or stipulation was ever shown nor was it ever mentioned that defendant entered his guilty plea "subject to" or "in reliance on" his pre-trial motion, the conviction is valid. Allen vs. State, 474 S.W.2d 480 (Tex. Crim. App. 1972); Nycum, supra. We overrule appellant's third ground of error.

In his fourth ground of error appellant contends the trial court violated his constitutional right to due process by examining the pre-sentence report prior to a determination of guild being made in violation of Tex. Crim. Proc. Code Art. 42.12, Sec. 4.

Appellant had plead guilty long before the pre-sentence investigation was made. Trial court did not violate Art. 42.12 by examining the

pre-sentence investigation report after a plea of guilty had been entered but before a determination of guilt had been made. Appellant's fourth ground of error is overruled.

Appellant's multifarious fifth ground of error alleges ineffective assistance of counsel for failure to object to punishment argument and failure to obtain a hearing on the motion for new trial. Appellant contends his attorney at the punishment hearing failed to object to the prosecutor's reference to hearsay in the pre-sentence investigation report. The prosecutor stated: "His youngest boy who has no reason to lie says they were going to pay for the trip, come back into the country and pay for trip by using the money earned from the marijuana. This person here (Appellant) sells it."

Appellant was charged only with possession of marijuana; intent to distribute was not alleged. The prosecutor apparently based this remark on

information in the presentence investigation report. The trial court granted appellant's object and deleted this information form the report.

A court is not required to disregard information in a pre-sentence report because hearsay statements are included. Clay v. State, 518 S.W.2d 550, 555 (Tex. Crim. App. 1975). As the trial court was entitled to consider the hearsay evidence in the pre-sentence report the prosecutor's remark could not have harmed appellant. Appellant's fifth ground of error is overruled.

In his sixth ground of error, appellant complains the evidence is insufficient to support his conviction. Appellant signed a judicial confession, a waiver of rights and a stipulation of the evidence. The judicial confession alone is sufficient to support the conviction. Fox v. State, 657 S.W.2d 449 (Tex. App. - Houston [14th Dist.] 1983,

no pet.). Appellant's sixth ground of error is overruled.

We affirm the judgment.

/s/ William E. Junell

Associate Justice

Judgment Rendered, and Opinion filed April 3, 1986.

Panel consists of Associate Justices, Junell, Robertson and Cannon.

No Publication - Tex. Cr. App. R.207

APPENDIX B

Minutes of 262nd District Court

of Harris County, Texas

at the May Term AD 1984

NO. 403245 JUDGEMENT

THE STATE OF TEXAS VS.

DATE: July 13, 1984

Frank Ronald Rester

Attorney for State :Asst. Dist. Atty R. Hardin

Attorney for Defendant : Paul D. Funderburk

[]Appointed []Retained The Defendant knowingly, intelligently and voluntarily waived Waiver of

Attorney [ ]: the right to representation by counsel .

Offense: Unlawfully, intentionally, and knowingly possesses marijuana in a useable quantity or more than four ounces and less than five pounds

Plea to Offense: Guilty

Plea to Enhancement: N/A

Findings on Enhancement: The Defendant is the same person n/a previously (Second offense or convicted of felonies as alleged in the indictment information Habitual).

Punishment : Fine of $3,000 and 6 years confinement in the Texas Dept. of Corrections

COURT ORDERED FINE AND/OR COST PAYABLE ON OR BEFORE day of upon release 19 .

COURT ORDERED FINE AND/OR COSTS OF $_____ AT THE RATE OF $_____ PER MONTH BEGINNING, FIRST PAYMENT DUE ___ DAY OF _____ 19 ___ AND ON THE SAME DAY OF EACH MONTH THERE- AFTER UNTIL SATISFIED.

IF SAID DEFENDANT SHOULD DEFAULT ON ANY PAYMENT AS OUTLINED, SAID DEFENDANT SHALL BE COMMITTED TO JAIL UNTIL REMAINING AMOUNT IS FULLY PAID. Date of Offense: April 6, 1984 Sentence to begin: 9-7-84

The Defendant having been indicted/in the above entitled and numbered cause for the felony offense shown above and this cause being this day called for trial, the State appeared by her District Attorney as named above and the Defendant named above appeared in person and either by Counsel as named above or waived counsel as indicated above, and both parties announced ready for trial. The defendant, in person, in writing, and in open court, waived his right of trial by jury, (such waiver being with the consent and approval of the Court and the District Attorney in writing and filed in the papers of this case) pleaded as indicated above to the charge

contained in the indictment. Thereupon the Defendant was admonished by the Court of the consequences of the said plea; and the Defendant persisted in entering said plea; and it plainly appearing to the Court that the Defendant was mentally competent and that the plea is free and voluntary. The Defendant, having in open court, in writing, waived the appearance, confrontation, and cross-examination of witnesses and consented to the oral stipulation of evidence and to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence. Such waiver and consent having been approved by the Court in writing and filed in the papers of the cause, the said plea of the Defendant was received and entered of record upon the minutes.

The Court, having heard the evidence submitted, and the argument of Counsel thereon, found the

Defendant guilty of the offense indicted above, a felony.

[ ] The Defendant, in person, in writing, and in open court, with the written agreement of the court, waived his right to the preparation of a pre-sentence report prepared by the Probation Officer, such waiver having been filed in the papers of the cause.

[ ] The Defendant not having waived the preparation of a pre-sentence report prepared by the Probation Officer, the Court directed the Probation Officer to prepare such report.

On the 7 day of September, A. D. 19 84, the Court assessed the punishment at confinement in the Texas Department of Corrections for the period indicated above.

It is therefore CONSIDERED, ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the offense indicated above, a felony, and that

the said Defendant committed the said offense on the date indicated above, and that the be punished by confinement in the Texas Department of Corrections for the period indicated above, and that the State of Texas do have and recover of the Defendant all costs of the prosecution, for which execution will issue.

And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered noting in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, to pronounce sentence against him as follows, to wit: "It is the order of the Court that the Defendant, named above who has been adjuged to be guilty of offense indicated above, a felony, and whose punishment has been assessed at confinement in the Texas Department of Corrections of the State of Texas, or other person legally authorized to received such

convicts, and said Defendant shall be confined in said Department of Corrections for period indicated above, in accordance with the provisions of the law governing the Texas Department of Corrections."

The said Defendant was remanded to jail until said Sheriff can obey the directions of this sentence.

Signed and entered this the 7 day of September, A. D. 19 84 .

/s/Doug Shaver

Judge, 262 District

Court of Harris County, Texas

To which action of the Court the defendant then and there, in open Court excepted and gave notice of appeal to the Court of Appeals in the State of Texas, Houston, Texas.

And inasmuch as said Defendant has given notice of appeal herein, execution of the Sentence is deferred to await the Judgment and order of our Court of Appeals in this behalf.

Bail set in the amount of $ 15,000 , pending appeal herein.

APPENDIX C

COURT OF APPEALS

14th Supreme Judicial District

1307 San Jacinto, 11th Floor

Houston, Texas 77002

May 1, 1986

Hon. Paul D. Funderburk
1303 Rosalie Street
Suite #2
Houston, TX 77004

Hon. J. Harvey Hudson
Assistant District Attorney
201 Fannin
Houston, TX 77002

RE: CASE NO. 14-84-00608-CR
TRIAL COURT CASE No. 403,245

STYLE: Rester, Frank Ronald
V: The State of Texas

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above case.

Respectfully yours,

MARY JANE SMART, CLERK

By

/s/(initials)

Deputy

Hon. Ray Hardy
District Clerk, Harris County
Attention: Criminal Division
P. O. Box 4651
Houston, TX 77210

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

STATE OF TEXAS

SEAL

RE: Case No. 0632-86
STYLE: Rester, Frank Ronald

June 24, 1987

O R D E R: The Appellant's Petition for Discretionary is refused. The Appellant's Motion for Rehearing is denied.

PER CURIAM

DO NOT ISSUE YOUR MANDATE FOR 15 DAYS FROM THE ABOVE DATE. (FINAL RULING)

COA#: 14-84-00608-CR Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Mary Jane Smart
Clerk
14th Court of Appeals
1307 San Jacinto, 11th Floor
Houston, TX 77002

APPENDIX D

[Notice of Appeal to the Supreme Court of the United States] File Stamp: Filed in 14th Court of Appeals, Houston, Texas, July 23, 1987, Mary Jane Smart, Clerk

No. C14-84-00608CR

IN THE COURT OF APPEALS

FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT

AT HOUSTON

FRANK RONALD RESTER, Appellant

VS.

THE STATE OF TEXAS, Appellee

NO. 0632-86

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

APPEAL FROM THE 262ND DISTRICT COURT OF

HARRIS COUNTY, TEXAS

TRIAL COURT NO. 403245

NOTICE OF APPEAL

TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that Frank Ronald Rester, the appellant above named hereby appeals to the Supreme Court of the United States from the final judgment of the Fourteenth Supreme Judicial District Court at Houston, Texas entered in this action on April 3, 1986 affirming the conviction and six year unprobated sentence of the Appellant in the 262nd District Court of Harris County, Texas.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph two (2).

Dated July 23, 1987.

/s/Paul Funderburk, Attorney for Defendant

PUBLISHER'S NOTE:

THE FOLLOWING PAGE IS UNAVAILABLE
FOR FILMING: 97

PROOF OF SERVICE - CERTIFICATE BY BAR MEMBER

I, Paul D. Funderburk, attorney for Frank Ronald Rester, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 23rd day of July, 1987, I served copies of the foregoing Notice of Appeal on all parties required to be served herein as follows:

On the State of Texas by leaving a copy thereof the Office of Mr. J. Harvey Hudson, Assistant District Attorney, Appeals Division, 201 Fannin, Houston, Texas 77002 and

On the State of Texas by mailing a copy in duly addressed envelope by certified mail, postage repaid to State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711. /s/Paul Funderburk, Attorney for Defendant

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

The Clerk will enter my appearance as Counsel of Record for Frank Ronald Rester (Please list names of all parties represented) who IN THIS COURT is Appellant.

I certify that I am a member of the Bar of the Supreme Court of the United States: Signature /s/ Paul D. Funderburk.

Name: Paul D. Funderburk; (Mr.); Firm: Law Office of Paul Funderburk; Address: 1401 Rosalie, Suite 2; City & State: Houston, Texas; Zip: 77004; (Phone: (713) 524-6144. Only counsel of record shall enter an apnearance. That attorney will be the only one notified of the Court's action in this case. Other attorneys who desire notification should make appropriate arrangements with counsel of record. Only attorneys who are members of the Bar of the Supreme Court of the United States may file an

appearance form. It is important that all requested information be provided.

CO-73A

APPENDIX E

UNITED STATES CONSTITUTION

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 4

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT 9

The enumeration in the Constitution, of certain rights, shall not be construed to deny or discharge others retained by the people.

AMENDMENT 10

The powers and delegated to the United Stated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States. Representatives in Congress, the Executive and Judicial Officers of a State, or

the members of the Legislature thereof, is denied to any of the male inhabitants of such State, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or any executive or judicial office of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies

thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for service in suppressing insurrection of rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article.

UNITED STATES TREATY

"SINGLE CONVENTION ON NARCOTIC

DRUGS, 1961"

Article 1, Definitions. 1. Except where otherwise expressly indicated or where the context otherwise requires, the following definitions shall apply throughout the Convention: (a) "Board" means the International Narcotics Control Board. (b) "Cannabis" means the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated. (c) "Cannabis plant" means any plant of the genus cannabis. (d) "Cannabis resin" means the separated resin, whether crude or purified, obtained from the cannibus plant.

Article 2, Substances under Control. 2. The drugs in Schedule II are subject to the same measures of control as drugs in Schedule I with the

exception of the measures prescribed in Article 30, Paragraphs 2 and 5, in respect to the retail trade. (5) The drugs in Schedule IV shall also be included in Schedule I and subject to all measures of control applicable to drugs in the latter Schedule, and in addition thereto: (a) A Party shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a drug as included.....

Article 3, Changes in the Scope of Control. 1. Where a Party or the World Health Organization has information which in its opinion may require an amendment to any of the Schedules, it shall notify the Secretary-General and furnish him with the information in support of the notification. 4. If the World Health Organization finds that preparation because of the substances which it controls is not liable to abuse and cannot produce ill effects (Paragraph 3) and that the drug therein is not

readily recoverable, the Commission may, in accordance with the recommendation of the World Health Organization, add that preparation to Schedule III.

Article 23, Nation Opium Agencies. (d) All cultivators of the opium poppy shall be required to deliver their total crops of opium to the Agency.

Article 28, Control of Cannabis. 1. If a Party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in Article 23 respecting the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes. 3. The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.

Article 31, Special Provisions Relating to International Trade. 3. The Parties shall: (b)

Control all persons and enterprises carrying on or engaged in such import or export.

Article 33, Possession of Drugs. The Parties shall not permit the possession of drugs except under legal authority.

Article 36, Penal Provisions. 1. Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any provisions of this Convention, shall be punishable offenses when committed intentionally, and that serious offenses shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty. 2.

Subject to the constitutional limitations of a Party, its legal system and domestic law, (a) (i) Each of the offenses enumerated in Paragraph 1, if committed in different countries, shall be considered as a distinct offense. 4. Nothing contained in this Article shall affect the principle that the offenses to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

Article 41, Entry Into Force. 1. This Convention shall come into focus on the thirtieth day following the date on which the fortieth instrument of ratification or accession is deposited in accordance with Article 40.

Article 49, Transitional Reservations. 2. (e) Coca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention as provided in Paragraph 1 of Article 41. (f) The use of cannabis for other than medical and

scientific purposes must be discontinued as soon as possible but in any case within twenty-five years from the coming into force of this Convention as provided in Paragraph 1 of Article 41.

UNITED STATES STATUTE "COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970"

"Public Law 91-513; 84 Stat. 1236, Title II, Control and Enforcement, Part E, Administrative and Enforcement Provisions, Sec. 709, Appropriations Authorizations. Title II, Control and Enforcement, Part B, Authority to Control; Standards and Schedules Sec. 202 Schedules of controlled substances.

(1) Schedule I. (A) The drug or other substance has a high potential for abuse. (B)The drug or other substance has not currently accepted

medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

Section I. (c) Unless specifically excepted or unless listed in another Schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation: (10) Marijuana. Title II, Control and Enforcement. Part D, Offenses and Penalties. Part D, Offenses and Penalties. Sect. 401 (a) Except as authorized by this title, it distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substances; or (b) In the case of a controlled substance in Schedule I or II which is not a narcotic drug or in the case of any controlled

substance in Schedule III, such person shall be sentence to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this Paragraph, or for a felony under any other provision of this title of title III or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000 or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at

least 4 years in addition to such term of imprisonment.

TEXAS REVISED CIVIL STATUTES, ART. 4476-15,

SECTION 4.051

"Sec. 4.051 (a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally possesses a usable quantity of marijuana.

(b) An offense under Subsection (a) of this section is: (1) a Class B misdemeanor if the amount of marijuana possessed is two ounces or less; (2) a Class A misdemeanor if the amount of marijuana possessed is four ounces or less but more than two ounces; and (3) a felony of the third degree if the amount of marijuana possessed is five pounds or less but more than four ounces; and (4) a felony of the

second degree if the amount of marijuana possessed is 50 pounds or less but more than 5 pounds.

(c) A person commits an aggravated offense if the person commits an offense under Subsection (a) of this Act and the amount of marijuana possessed is more than 50 pounds.

(d) An offense under Subsection (c) of this section is: (1) punishable by confinement in the Texas Department of Corrections for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000, if the amount of marijuana possessed is 200 pounds or less but more than 50 pounds; (2) punishable by confinement in the Texas Department of Corrections for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of marijuana possessed is 2,000 pounds or less but more than 200 pounds; and (3) punishable by confinement in the Texas Department of Corrections

for life or for a term of not more than 99 years or less than 15 years, and a fine not to exceed $250,000, if the amount of marijuana possessed is more than 2,000 pounds.

(e) An offense for which the punishment is prescribed in Subsection (b) of this section may not be considered a crime of moral turpitude.

APPENDIX F

CASE #: 764 36H

THE STATE OF TEXAS IN THE COUNTY CRIMINAL

V.S. COURT AT LAW #6

Frank Ronald Rester OF HARRIS COUNTY, TEXAS

CHARGE: Poss. Marij.

CASE RESET FORM

The undersigned Defendant and Counsel acknowledge this case is reset for Plea of Guilty [scored through] From May 4, 1984 to May 18, 1984 A.D. 1984 at 9:00 A.M.

File Note: Motion from No. 488 previously denied again dismissed May 4, 1984 /s/ J. N. Musselwhite.

The period of delay resulting from this reset by Agreement or at defense request shall be excluded in calculating th periods of time set out in Article 32A.02.

The State and the Defendant have entered into the following Plea Bargain Agreement:

Jail	Credit	Probated
Fine	Probated	Deferred

Restitution [written:] Case to be refiled as a felony. Misd. to be dismissed.

/s/ Lee Coffee	Frank Ronald Rester
ATTORNEY FOR THE STATE	DEFENDANT
REASON FOR RESETTING:	REQUESTOR"S INITIALS
APPOINTED	
HIRED	DEFENSE REQUEST
OPERATION OF LAW	OTHER
BY AGREEMENT	Paul Funderburk
STATE REQUEST	ATTY. FOR DEFENDANT
COMMENTS	07549000 (BAR NUMBER)
By /s/m. Stanton	/s/ Paul Funderburk
Deputy	(713) 520-6868

APPROVED

/s/B. Bri 5-4

COORDINATOR DATE DISTRICT

FORM NO. 488

WAIVER OF DELAY IN

SENTENCING DEFENDANT REPRESENTED

BY ATTORNEY ON PLEA OF GUILTY

NO. 764341

THE STATE OF TEXAS VS.

FRANK RONALD RESTER

IN THE COUNTY CRIMINAL COURT NO. 6

HARRIS COUNTY, TEXAS

TO THE JUDGE OF SAID COURT:

Now comes the defendant herein, in person and by and through his attorney, and represents to the Court that he desires to make immediate disposition of this case by here and now entering his plea of guilty herein, waiving trial BY JURY and submitting it to the Court on all issues of law and fact:

Wherefore, premises considered, defendant prays the Court to proceed immediately on the filing hereof to arraign him in this cause, to accept his

said plea of guilty and waiver of trial by jury, to enter judgment thereon and, having entered the same, to immediately sentence him in the manner provided by having entered the same, to immediately sentence him in the manner provided by law, waiving for said purpose every provision of the law the effect of which would delay or arrest entry of judgment or imposition of sentence herein.

/s/Frank R. Rester (Defendant)

/s/Paul D. Funderburk

Attorney for Defendant

Paul D. Funderburk

2516 Sunset Blvd.

Houston, Texas 77005

(713) 520-6868

B.N. 07549000

File Stamp: FILED, RAY HARDY, District Clerk, Filed: May 1, 1984, R. Rios

The foregoing application, filed with the clerk and presented to the court on the 2nd day of May, A.D. 1984, is considered approved and granted on the same date. [Approved and granted scored through, "Denied" written above]

/s/J. N. Musselwhite

Judge

Form Waiver of Delay in Sentencing Defendant Represented by Attorney on Plea of Guilty.

Court Coordinator No. 2-A

APPENDIX G

CASE NO. 4Q3245 CHARGE: Marij.

THE STATE OF TEXAS 262 DISTRICT COURT

V.S. Frank Rester OF HARRIS COUNTY, TX

AGREED SETTING

The undersigned Counsel hereby agrees this case is reset for

Disp. to June 14, 1984

(Type of Setting) (Date)

/s/Pat Shelton /s/ Frank Rester

Attorney for State Defendant

[Hand written note]:

8 years probation /s/Paul D. Funderburk

$1,000 fine - hold open Atty. for Defendant

D. Attorney motion double /s/Paul D. Funderburk

jeopardy to give me. 2516 Sunset Blvd.

APPROVED BY THE COURT: Houston, TX 77005

DW (initials) (713) 520-6868

Judge Presiding 07549000 (Bar Number)

5-23 (Date)

File Stamp: FILED, RAY HARDY, District Clerk

May 23, 1984

By 11

Harris County, Texas

By J. Nelly

/s/JH

CAUSE NO. 403245 CHARGE: Marij.

THE STATE OF TEXAS 262 DISTRICT COURT

VS. Frank Rester OF HARRIS COUNTY, TX

AGREED SETTING

The undersigned Counsel hereby agrees this case is reset for

Disp. to June 13, 1984

/s/ Pat Shelton /s/ Frank Rester

Atty. for State Defendant

[Hand written note]

8 years probation

$1,000 fine - hold open

D. Attorney double

jeopardy to give me

APPROVED BY COURT:

SIGNED

Judge Presiding

May 23

Paul D. Funderburk

Houston, Texas

(713) 520-6868

07549000 (Bar Number)

FILED(Stamped)

Ray Hardy

District Clerk

May 23, 1984

APPENDIX J

Clerk Stamp:

Filed in 14th Court of Appeals, Houston, Texas, July 31, 1985, Jane Smart, Clerk

FILE NOTE: Motion Denied August 8, 1984

IN THE COURT OF APPEALS OF TEXAS

FIRST SUPREME JUDICIAL DISTRICT

APPEAL FROM THE 262ND DISTRICT COURT

APPELLATE COURT NO. C14-84-608-CR

(TRIAL COURT NO. 403-245)

FRANK RONALD RESTER

APPELLANT

APPELLATE COURT NO. C14-84-608-CR

VS.

THE STATE OF TEXAS

Appellee

APPELLANT'S MOTION TO ABATE APPEAL

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

COMES NOW FRANK RONALD RESTER, Appellant in the above entitled and numbered appeal and by and through his attorney of record on appeal respectfully moves this Court to abate the instant appeal and order the case remanded to the District Court for the purpose of having the record on appeal supplemented and consistent with Appellant's right to effective assistance of counsel on appeal as a matter of right on his first appeal and in accordance with the intervening decision in (1) Evitts vs. Lucey (r) U.S., 105 S.Ct. 830 (January 21, 1985), and in support thereof, Appellant would show this Honorable Court the following:

[Sections omitted]

AUTHORITIES AND ARGUMENTS

As stated in the said Motion of the Appellant, the Trial Judge was prejudiced in this case with the religious motivation prohibited by the Civil Rights Law of the U.S. The 1st and 14th Amendments of the U.S. Constitution, as well as the Texas Constitution, Article I Sec. 14. The Code of Judicial Conduct, Cannon 3C (1) was also violated by his position as Judge in this case.

Under such circumstances and as otherwise stated in Appellant's motion to disqualify the Honorable Doug Shaver is disqualified and was obligated to certify that fact to the presiding Judge of the Administrative Judicial District as mandated in Article 30.02 C.C.P. The provision of Rule 18a T.R.C.P. are applicable to similar actions in like cases and the provisions thereof are instructive as well as persuasive in instance case.

The abatement hearing prayed for in this motion should be held in District Court other than the 262nd District Court.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Court grant his motion to abate appeal and order the cause remanded with instructions that a factual record be developed on a hearing on Appellant's motion to suppress and filed with this Court as a supplemental record on appeal. And, it is further prayed that said hearing on abatement be held in a Court other than 262nd Judicial District Court or any other Court where Honorable Doug Shaver may be presiding at the time of the hearing of said abatement will be held.

Respectfully submitted

Paul D. Funderburk

Attorney for Appellant

(Certificate of Service omitted)

APPENDIX K

Stamp: Filed in 14th Court of Appeals, Houston, Texas, August 6, 1985, Jane Smart, Clerk

File Stamp: Motion Denied August 8, 1985

IN THE 14TH COURT OF APPEALS OF TEXAS

NO. 148400608CR

APPEAL FROM 262ND DISTRICT COURT

OF HARRIS COUNTY, TEXAS

TRIAL COURT NO. 203245

STATE OF TEXAS

VS.

FRANK RONALD RESTER

SUPPLEMENTAL MOTION TO ABATE APPEAL

TO THE HONORABLE 14TH COURT OF APPEALS:

COMES NOW, FRANK RONALD RESTER, Appellant, by and through his Attorney of Record, Paul Funderburk,

and, in addition to the grounds for abatement contained in Appellant's Motion for Abatement filed herein on August 2, 1985, would show the Court as further grounds for abatement of this Appeal, the following:

I.

Abatement of this Appeal should include supplementalization of the Record in this case by addition of notes to and memo of Assistant District Attorney Carol Davies which is contained in the file of the District Attorney of Harris County in this case. Appellant objected to the Record in this case (TR 82) before the commencement of this Appeal, on December 27, 1984 because "It does not contain the note of Paul Funderburk dated July 11, 1984 to Assistant D. A. The Record does not contain the front of the D.A.'s file on which the plea bargaining agreement and acceptance by the Defendant had been written by Assistant D.A., Pat Shelton".

The notes to which this motion relates are both in the file of the District Attorney (or have been there previously) and are described in Appellant's motion of December 27th, 1984 (TR 88) as follows: "Ms. Davies made a note in the District Attorney's file of the case (seen by Affiant on July 13, 1984 during the disposition setting) which stated that if Affiant presented evidence on the motion to suppress, the State would withdraw their recommendation on punishment. (9) On or about July 11, 984.... Affiant left her note stating that no evidence would be presented on the motion to suppress and reaffirming arrangements to enter the guilty plea with State's recommendation as previously agreed....."

The note or memorandum by Carol Davies, Assistant D.A., dated on or about June 28, 1984 on her conference with Attorney Paul Funderburk and the note of Paul Funderburk dated on or about July 11,

1984 accepting the plea bargain agreement are both indispensable to this appeal and on abatement of this appeal the trial court should order inclusion of said notes in the record of this case.

WHEREFORE, PREMISES CONSIDERED, Appellant pravs this Honorable Court that this appeal be abated and ordered returned to the Trial Court with instructions that two said notes in the file of the Harris County District Attorney's office be subpoenaed and included in the appellate record of this case together with abatement of this cause by reason of ineffective assistance of counsel as prayed for in Appellant's motion filed August 2, 1985.

Respectfully submitted

Paul D. Funderburk

Attorney for Appellant

1303 Rosalie

Houston, Texas 77004

(713) 524-2220

APPENDIX L

No. 403245

STATE OF TEXAS () IN THE 262ND DISTRICT COURT

VS ()

FRANK RONALD RESTER () HARRIS COUNTY, TEXAS

MOTION TO WITHDRAW JUDGMENT FROM THE RECORD AS VOID AND MOTION FOR THE COURT TO INCLUDE ADDITIONAL MATERIAL IN RECORD AS OBJECTION TO RECORD

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Frank Rester, Defendant herein and moves the Court to delete the Judgment (TR 56-57) in this case, withdrawing the same as void and as grounds would show the Court:

Said Judgment was entered on September 7, 1984 when Attorney Paul Funderburk was not present in court and had not appeared for the Defendant although the judgment falsely states that he was

present as further stated in the affidavit of Paul Funderburk, attached hereto (See Art. 42.01 (2) C.C.P.)

Said Judgment states that Defendant "pleaded as indicated above (guilty) to the charge contained in the indictment. This statement and all others in said judgment indicating that Defendant entered a guilty plea on September 7, 1984 is completely incorrect and the previous finding of guilt of July 13, 1984 had been withdrawn by the Court (SF 20-21). Therefore, there never has been a finding of guilt to the date of this motion as further pointed out in the affidavit of Paul Funderburk attached hereto.

The Judgment states (TR 57) that "The defendant not having waived the preparation of a presentence report by the Probation Office..." This statement is in error as Defendant waived the making of such a report as stated in State's Exhibit 2 and as further discussed in the record (SF 17-18). Rather, the

court ordered a P.S.I. on it's own motion in open court (SF 21). State's Exhibit #1 and #2 were improperly omitted from the transcript in this case (TR 67).

The Judgment is void as against the Texas Constitution as stated in State Ex. Rel Turner VWT McDonald, 676 SW 2nd 375 because the hearing on judgment and sentencing, including introduction of the presentence report was held before there was any finding of guilt, the earlier finding of guilt of July 13, 1984 having been withdrawn by the Court (TR 20-21)

The Judgment is void in that it is based on a guilty plea entered on July 13, 1984 (TR 32) which was, contrary to its terms, void for reasons of involuntariness explained in the affidavit of Paul Funderburk attached hereto and made a part hereof and said involuntariness of a plea was graphically explained in the presence of the court during an

angry confrontation off the record only minutes after the court had withdrawn its finding of guilt and ordered a pre-sentence investigation. It was the duty of the court at that time to set aside the guilty plea as stated in Shallhorn vs. State, 671 SW 2nd 730.

The Judgment cites the plea of guilty (presumably of July 13, 1984 (TR 32) in which a clerical error appears in the handwritten note "No Agreed Recommendation. States reserves right to argue punishment defendant requests a presentence investigation and report." This sentence requesting a presentence report was in error and should have read "waives" rather than "requests". Defendant waived such a report in State's Exhibit #2 (SF 17-18).

The Judgment is void and against the U.S. Constitution as was the indictment placing defendant in double jeopardy as stated in Defendant's pretrial

motion (TR 27) and as evidence showed at the hearing of July 13, 1984 (SF 4-8).

The Judgment is void because based upon a supposed guilty plea of July 13, 1984 which was involuntary for reasons stated in the affidavit of Paul Funderburk, attached hereto.

The Judgment is void because based upon a guilty plea of July 13, 1984, in a proceeding in which he was (the defendant) denied effective assistance of counsel, guaranteed under the U. S. Constitution, Amendment VI for reasons stated in the affidavit of Paul Funderburk attached hereto.

The Judgement is void because based upon a guilty plea prompted and motivated by States unlawful breach of a Plea Bargaining Agreement, the motive of the State and it's attorney in breaching the Agreement being one of religious discrimination against defendant and his attorney Paul Funderburk in violation of the U. S. Constitution, Amendment I

and the U.S. COde, Art. 1983 (Civil Rights Statue) as stated in the affidavit of Paul Funderburk attached hereto.

The defendant hereby presents his bill of exceptions to the action of the court of overruling defendant's motion for new trial, thereby depriving defendant of the right to present testimony of masters stated in the affidavit of Paul Funderburk attached hereto, and other testimony by Mr. Terry Collins.

OBJECTIONS TO THE RECORD

Defendant, pursuant to Art. 40.09 C.C.P. hereby objects to the approval of the record because many items important to defendant's appeal have been omitted from the record as stated in the following objections: The defendant objects to the omission of the defendant's waiver of the presentencing investigation (State's Exhibit #2) as introduced into evidence (SF 17-18) and the omission of all

other Exhibits (TR 67). It does not contain the note of Paul Funderburk dated July 11, 1984 to Assistant D. A. Carol Davies as described in the affidavit of Paul Funderburk attached hereto, the record does not contain the front of the D. A.'s file on which the Plea Bargaining Agreement and acceptance by the defendant had been written by Assistant D. A., Pat Shelton.

MOTION TO WITHDRAW GUILTY PLEA

Defendant moves the court to withdraw the defendant's plea of guilty of July 13, 1984, based upon the ineffective assistance of counsel at the hearing on said date as stated in the affidavit attached hereto. Defendant further moves the court to withdraw the plea of guilty because subsequent to the plea of July 13, 1984 the Texas Code of Appeals made a holding under which the guilty plea herein was an action constituting reversible error as stated in Shallhorn vs. State, 671 SW 2nd 730.

Respectfully submitted,

_____

Paul D. Funderburk

TBC 07549000

3400 Montrose

Suite 702A

Houston, Texas 77006

(713) 524-2220

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been hand delivered to counsel of record herein on this 27th day of December 1984.

Paul D. Funderburk

(File Mark)

Denied

December 27, 1984

Doug Shaver (signed)

APPENDIX N

EXCERPTS FROM MOTION FOR REHEARING IN THE TEXAS COURT OF APPEALS, 14TH SUPREME JUDICIAL DISTRICT:

The Court errs, committing fundamental, jurisdictional error, in failing to acquit the Defendant on his plea and proof of former jeopardy.

The Court errs, committing fundamental, jurisdictional error, in failing to remand for evidentiary consideration of affidavit of Attorney Paul Funderburk (alleging violations of due process of law in the entry of the guilty plea in 262nd District Court) even assuming, without conceding, that said affidavit is "self serving", "untimely", or "ex parte".

The Court's opinion errs in stating "the record fails to show that the State withdrew a plea bargaining agreement upon which Appellant had relied to his detriment" in that the record shows this

matter independently of the affidavit of Attorney Paul Funderburk.

The Court errs in stating that nothing in the record supports Appellant's contention that he receive erroneous advice from his attorney regarding the effect of his guilty plea on his right to appeal his pretrial motions.

The Court errs, in regard to instant case, in assuming the applicability of two rulings quoted with approval in the opinion, to-wit (1) Defendant has not right to demand that State enter into a plea bargaining agreement, and (2) only when a plea bargaining agreement is accepted by the trial court does it become a contract which binds the State.

The Court errs in regard to instant case, in quoting with approval in inapplicable rule from a cited case, to-wit; "a Defendant cannot vitiate a careful plea taking proceeding by later contending that he swore falsely".

The Court errs, in regard to instant case, in quoting with approval an inapplicable rule from cited case, to-wit; "the trial court has no duty to warn against or correct all of a Defendant's misbegotten expectation of the scope of his appellate rights".

The Courts errs, in regard to instant case, in stating an inapplicable conclusion, to-wit; "where no agreement or stipulation was ever shown nor was it ever mentioned that Defendant entered his guilty plea "subject to" or "in reliance on" his pre-trial motion, the conviction is valid.

The Court errs, in regard to appellant's fourth ground of error on the Court's consideration of the presentence investigation, in misinterpreting said ground of error in the statement from the opinion, to-wit; "appellant had plead guilty long before the presentence investigation was made. The trial court did not violate Article 42.12 by examining the

presentence investigation report after a plea of guilty had been entered but before a determination of guilt had been made".

The Court errs, in regard to Appellant's fifth ground of error concerning the failure of defense counsel to object to State's improper argument on sentencing as ineffective assistance of counsel, in misinterpreting said ground of error in the statement from the opinion, to-wit; "Appellant contends his attorney at the punishment hearing failed to object to the prosecutor's reference to hearsay in the presentence investigation report". As the Appellant's ground of error No. 5 complains that the improper argument was one concerning an unadjudicated offense, not a matter of "hearsay" alone.

The Court errs, in regard to Appellant's sixth ground of error regarding the insufficiency of the evidence to support the conviction, in

misinterpreting said ground of error in the statement from the opinion, to-wit; "Appellant complains the evidence is insufficient to support his conviction. Appellant signed a judicial confession, a waiver of rights and stipulation of the evidence. The judicial confession alone is sufficient to support the conviction". As the Appellant's ground of error No. 6 complains that the judicial confession omitted any competent evidence of one of the jurisdictional elements of the offense of marijuana possession, the element of the weight of the marijuana possessed.

The Court errs, in regard to Appellant's sixty ground of error regarding the inaction of his counsel in attaching appropriate affidavits to the timely motion for new trial and in regard to his inaction in seeking a hearing on said motion, in failing to discuss said ground of error.

The Court errs, in regard to Appellant's sixth ground of error in failing to discuss Appellant's contention that the judicial confession herein, waived only non-jurisdictional defects, not the jurisdictional defense which exists due to the court's obvious error regarding admonition on entry of the judicial confession, a statement from the trial judge that "I informed the Defendant that I would not exceed the agreed recommendation as to punishment" (R. I-32).

The Court errs, in failing to hold unconstitutional the statute under which Appellant was charged in 262nd District Court, Article 4476-15(a) and (b) V.A.C.S., because of the unconstitutional, "cruel and unusual" length of punishment prescribed for the offense of possession alone of more than four or less than five pounds of marijuana.

The Court errs, in failing to hold unconstitutional the statute under which Appellant was charged in 262nd District Court, Article 4476-16(a) and (b) V.A.C.S., because of the length of the possible punishment for the offense of possession alone for more than four ounces but less than five pounds makes said statute an easy vehicle for the unadjudicated, de facto, punishment for offenses not charged such as for distribution of marijuana, an unadjudicated offense for which Appellant was, de facto, punished in instant case in violation of the fundamental constituted rights of Appellant.

The Court errs, committing fundamental, jurisdictional error, in failing to hold that ineffective assistance of counsel was provided to Appellant when his counsel at the hearing on sentencing held September 7, 1984, failed or refused to state on the record that the guilty plea

previously entered on July 13, 1984 had been coerced and involuntary.

EXCERPTS FROM MOTION FOR REHEARING IN THE TEXAS COURT OF CRIMINAL APPEALS AT AUSTIN RELATED TO MARIJUANA PROHIBITION:

(b) The constitutionality of the marijuana possession statute is challenged in the trial court (R.I-10) and on appeal, Motion for Rehearing (pp. 28-29). Article 4476-15(a) and (b) V.A.C.S. constitute cruel and unusual punishment. People vs. Lorentzen, 194 N.W.2d 827 (S.Ct. Mich., 1972). A statute punishment, whereby to increase the severity in sentencing for unadjudicated, or even uncharged related offenses. This is a vagueness which allows a false appearance of regularity in procedure to cover unrelated matters in sentencing. The instant case is a case in point where Petitioner was actual sentenced for the sale, rather than the charged possession, of marijuana. See People vs. Farris,

232 N.W.2d 723 (Mich. App., 1975) and People vs. Serra, 223 N.W.2d 28 (Mich. App., 1974).